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No. 71-514

In the Supreme Court of the United States

OCTOBER TERM, 1971

THE IOWA TRIBE OF THE IOWA RESERVATION IN KANSAS AND NEBRASKA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the Court of Claims (Pet. Separate App. 162-167) is not yet reported. The opinion of the Indian Claims Commission (Pet. Separate App. 73-161) rendered on remand is reported at 22 Ind. Cl.Comm. 232. The prior opinion of the Court of Claims is reported at 179 C.Cls. 8, 383 F.2d 991. The original opinion of the Indian Claims Commission (Pet. Separate App. 1-48) is reported at 6 Ind. Cl.Comm. 464.

JURISDICTION

The judgment of the Court of Claims was entered on July 14, 1971. The petition for a writ of certiorari was filed on October 12, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1). See Section 20(c) of the Indian Claims Commission Act of August 13, 1946, 60 Stat. 1054, 25 U.S.C. 70s(c).

QUESTIONS PRESENTED

1. Whether the finding of the Indian Claims Commission that the petitioners did not have aboriginal title to the lands involved was supported by substantial evidence.

2. Whether the 96-page opinion of the Indian Claims Commission meets the statutory requirement that the Commission make findings of fact.

STATUTE INVOLVED

Section 19 of the Indian Claims Commission Act of August 13, 1946, 60 Stat. 1049, 1054, 25 U.S.C. 70r, provides in pertinent part:

> The final determination of the Commission shall be in writing, shall be filed with its clerk, and shall include (1) its findings of the facts upon which its conclusions are based; (2) a statement (a) whether there are any just grounds for relief of the claimant * * *.

STATEMENT

Petitioners originally filed a petition with the Indian Claims Commission seeking to recover additional compensation for lands petitioners claimed by aboriginal and/or recognized title. The claimed lands (known as Cession 69) are in north-central and northeastern Missouri and were ceded to the United States by each tribe by separate but similar treaties signed on August 4, 1824. 7 Stat. 229 and 7 Stat. 231. The Commission held in its original opinion that each petitioner had aboriginal title to a separate portion of these lands, but further held that the central area between the areas awarded to each was held by neither. 6 Ind. Cl. Comm. 464, 482, 493. This decision was appealed to the United States Court of Claims on several grounds, including the claim that the Commission erred in holding that aboriginal title could not be acquired against the United States after the United States acquired the lands by the Louisiana Purchase in 1803. 6 Ind. Cl. Comm. at 502. The Court of Claims affirmed in part, and reversed and remanded only to the extent of requiring the Commission to determine whether either petitioner acquired aboriginal title after 1803 to any portion of the unawarded central area. *Sac and Fox Tribe* v. *United States*, 179 C. Cls. 8, 23, certiorari denied, 389 U. S. 900.

On remand, the Commission reconsidered its original holding to determine if petitioners had acquired aboriginal title to additional lands between 1803 and

the treaties of 1824. 22 Ind.Cl.Comm. 232. The Commission found (*id.* at 237; Pet. Separate App. 77-78):

> After examining the record with particular attention to the matters pointed out by the Court of Claims in its decision on remand and after considering the new briefs and oral arguments of the parties, the Commission concludes for reasons which will be discussed in detail that the plaintiffs have not met their burden of proving actual, exclusive and continuous use and occupancy of additional lands for a long period of time prior to 1824 and that the areas of land credited to the plaintiffs in our previous decision should not be changed in any way.

On petitioners' appeal, the Court of Claims, in a *per curiam* opinion, was "compelled to conclude" (Pet. Separate App. 164):

> * * * first, that the controlling issues are of fact; second, that the Commission's determination of those factual questions is plainly supported by substantial evidence on the record as a whole; and, third, that this factual determination by the Commission is not infected by any relevant or significant legal error.

The court emphasized that nothing in the voluminous record proffered demands the result for which the petitioners argue and that "the Commission made a careful and conscientious effort to comply with our mandate and to resolve the factual issue * * *" (Pet. Separate App. 164-165).

ARGUMENT

1. Petitioners contend that the Commission and the Court of Claims erred in failing to recognize the joint or common title of the petitioners' tribes in lands which they occupied "together exclusively" (Pet. 11). It is not seriously contended that the Commission or the Court of Claims misunderstood the law of aboriginal title as it has heretofore been recognized or that the Commission lacked substantial evidence to support its application of that law to the facts of this case. Rather petitioners urge this Court to formulate a new rule of aboriginal title which would recognize common ownership by tribes in lands which they used "together exclusively" (Pet. 11). The rule urged by the petitioners is contrary to all authority on aboriginal title, and would have no application to the facts of this case as found by the Commission.

The test applied by the Commission was that a claimant tribe must show "actual, exclusive and continuous use and occupancy of * * * lands for a long period of time" (Pet. Separate App. 78) in order to establish aboriginal title. This is the only recognized test of aboriginal title and has received repeated and consistent use and approval.[1] It is not

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[1] *Northwestern Bands of Shoshone Indians* v. *United States*, 324 U.S. 335, 338-339; *United States* v. *Santa Fe Pacific R.R.*, 314 U.S. 339, 345; *Buttz* v. *Northern Pacific R.R.*, 119 U.S. 55, 69-70; *Worcester* v. *Georgia*, 6 Pet. 515, 559; *Johnson and Graham's Lessee* v. *McIntosh*, 8 Wheat. 543; *Confederated Tribes of Warm Springs Reservation* v. *United States*, 177 C.Cls. 134, 194; *Red Lake, Pembina and White Earth Bands*

claimed in the petition that the Commission's findings and application of this rule were unsupported by substantial evidence.

Indeed, the Commission's findings not only established that neither petitioner tribe proved actual exclusive and continuous use and occupancy of the portion of the unawarded lands which each claimed separately, but also showed that, even considered jointly, they did not "together exclusively" (Pet. 11) occupy the claimed lands. Thus the rule urged by the petitioners has no application to their own case.

With respect to the Iowa, the Commission found (Pet. Separate App. 114-115):

> Whereas they had one or two villages at a time at several locations within the additionally claimed territory beginning with the War of 1812 through 1824, they had no villages in the area prior to the War of 1812, and from 1815 through 1823 the principal Iowa villages were outside of the claimed territory. Whereas some members of the tribe hunted and participated in war parties intermittently in the claimed territory prior to the War of 1812, their use thereof was by no means exclusive but rather was challenged with reciprocal warfare and hunting by the Osage throughout that period. The Winnebago, Sioux, and Sac, and probably the Pottawatomi also made use of the claimed territory

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v. *United States*, 164 C.Cls. 389, 393; *Spokane Tribe* v. *United States*, 163 C.Cls. 58, 66; *Sac and Fox Tribe* v. *United States*, 161 C.Cls. 189, 201-202, certiorari denied, 375 U.S. 921; *Quapaw Tribe* v. *United States*, 128 C.Cls. 45, 49-50; *Snake or Piute Indians* v. *United States*, 125 C.Cls. 241, 254.

for raiding and hunting between 1803 and 1812, and the Sac and Fox each had a village on the Grand River in 1816.

With respect to the Sac and Fox, the Commission found (Pet. Separate App. 152-153):

> From the late 1700's until 1812, Sac and Fox usage of the south-central portion of Cession 69 was actively challenged with warfare by the Osage who looked on the territory north of the Missouri as their hunting country. There is reason to believe that numerous other tribes including the Sioux, Iowa, Kickapoo, Pottawatomi, Winnebago, Chippewa and Ottawa also used the central and southern portion of Cession 69 for raiding and incidental hunting through 1810 and perhaps later. Whereas the Sac and Fox reportedly had a village on the Grand River in the western portion of Cession 69 in 1816 (in the portion claimed by the Iowa plaintiffs) and a village and/or a camp in the southeastern portion of Cession 69 in 1818, it appears that they had no village anywhere in Cession 69 before or after these dates, and that with the possible exception of the 1818 camp and/or village all of the Sac and Fox had returned to their traditional village sites northeast of Cession 69 by 1817. The Iowa village on the Chariton River from 1820-1822 refutes the Sac and Fox claim to exclusive use and occupancy of that area. From 1803 to 1816 the primary hunting grounds of the Sac and Fox included Cession 50, the northeast corner of Cession 69, and the area north and west of Cession 69. As early as 1811 large numbers of the Sac and Fox had largely abandoned commercial hunting to engage in lead mining and smelting in

northeast Iowa and northwestern Illinois. From 1817 through 1824 their primary hunting grounds and raiding activities were north and west of Cession 69.

While these findings were made in support of the Commission's ruling that neither tribe had exclusive possession of the areas each claimed separately, they also show that the two did not "together exclusively" occupy those lands. Neither tribe had substantial villages in the area and numerous other tribes, including the Osage, the Winnebago, the Sioux, the Pottawatomi, the Kickapoo and the Chippewa hunted and raided in the area until 1810 or 1812. Thus even considered together, the petitioners did not have actual exclusive and continuous possession and occupancy of the claimed lands for a long period of time prior to 1824.

The exclusive use and occupancy test is a wholly proper standard designed to give workable dimension and content to contemporaneous notions of land use by peoples who had no concept of land title or property in land. Cf. *Northwestern Bands of Shoshone Indians* v. *United States*, 324 U. S. 335, 357 (Jackson, J. concurring).

2. Petitioners' second argument, that the Commission did not make findings on remand, is highly technical and presents no substantial question. A court or administrative agency is not required to make specific numbered and stated findings of fact as long as the conclusions are sufficiently definite to permit judicial review on appeal. *Beaumont, S. L. & W. Ry.* v.

United States, 282 U.S. 74, 86-87; *Braniff Airways, Inc.* v. *Civil Aeronautics Board*, 306 F.2d 739, 742 (C.A. D.C.). Cf. *Minneapolis & St. Louis R. Co.* v. *United States*, 361 U.S. 173. The Commission's original findings of fact, 6 Ind.Cl.Comm. 464, together with subsequent 96-page opinion, were sufficient to permit the Court of Claims to perform its appellate function, and satisfy the requirements of Section 19 of the Indian Claims Commission Act, 60 Stat. 1054, 25 U.S.C. 70r.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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